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IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1114

THE CUDAHY PACKING COMPANY, A MAINE
CORPORATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

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Attorneys for Petitioner.



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*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Now comes The Cudahy Packing Company, a Maine corporation, and respectfully asks that a writ of certiorari may issue to the United States Circuit Court of Appeals for the Seventh Circuit to review the decision in the above-entitled cause and, in support of its petition, respectfully shows unto your Honors the following:

STATEMENT OF THE MATTER INVOLVED.

Petitioner paid \$293,733.38 floor stocks taxes on its pork inventory of November 5, 1933. It also paid \$14,448.70 floor stocks taxes on wheat, field corn and sugar used in the processing of its pork products, and on cotton and jute used in the wrapping thereof (R. 77, 78, 111). On that part of the inventory subsequently sold to charitable institutions or exported, petitioner obtained refunds aggregating \$24,595.65, leaving a balance of \$283,546.43 unrefunded.

After *United States v. Butler*, 297 U. S. 1, invalidated the tax, petitioner filed, on June 30, 1937, a claim for refund on printed PT Form 76, as required by paragraph 2 of Section 914 of Title VII of the Revenue Act of 1936 (R. 24). All the data called for by the claim and the attached schedules A to E were given with the exception that schedule D, which by the printed instructions thereon directs the claimant to list each document, exhibit, statement of facts and other evidence submitted with the claim and relating to the non-shifting of the burden of the tax, was left blank (R. 24-29).

With the printed PT Form 76 there was forwarded to the Commissioner the affidavit and a letter of John F. Gearen, Jr., the secretary and chief accounting officer of claimant (R. 35-45).

The affidavit set forth facts showing:

1. That claimant paid the floor stocks taxes.
2. That it did not shift the burden of the amounts paid in any of the ways specifically mentioned in Section 902, and that there was no agreement by which it might do so, that is to say, that it did not "legally" shift the burden of the tax.

3. A detailed description of petitioner's method of operations and accounting as to hog products to show that neither the exact cost nor selling price of the inventory was ascertainable. No specific facts were set forth in the affidavit itself to support the averment of the claim that claimant had not shifted the burden of the tax indirectly in any manner whatsoever, from which it could be determined whether the economic burden of the tax had or had not been shifted in the sale of the inventory.

However, in the letter accompanying the claim and the affidavit, Mr. Gearen, among other things, said:

"We request that this letter be also regarded as a part of each claim and that the various items specified in this letter and in each of its detailed parts be regarded as being included by reference as a part of said claim." (R. 36.)

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"It is of course obvious that the detailed evidence in connection with the several transactions, beginning with the purchase of the live hogs and ending with the final disposition of the products derived therefrom, is impossible to be transmitted with this claim. It is furthermore obvious that for the purpose of audit it is far more practical, convenient, and would be productive finally of a correct finding if the original records, copies, reports, tests and other calculations are allowed to remain with the Company at its regular places of business where, during any audit or other procedure, such records may be immediately available to auditors for the Treasury Department as well as for the Company's own accountants and audits. And all such records are freely tendered herewith for the most adequate and complete inspection, investigation, and copying in so far as this may be deemed necessary to finally determine the validity of the several items." (R. 37-38.)

The Commissioner accepted the tender of facts as made

in Mr. Gearen's letter and sent his auditors, in charge of Mr. Freeman Morgan, to the offices, plants and branches of petitioner to examine the books and records relating to the claim (R. 149). They commenced the examination in August of 1937 and finished in December of the same year (R. 150). They were given access to all of the books and records of petitioner relating to its claim for floor stocks tax refund. They examined the weekly hog cutting test sheets from the Omaha, Kansas City, Sioux City, St. Paul, Wichita and Los Angeles plants (R. 150). They examined the departmental financial statements for the fiscal years from 1931 through 1936. They examined all of the daily sales tickets for the months of November and December, 1933, from the South Chicago branch and from the Omaha, Sioux City and Kansas City plants. They also inspected the corporate minute books from 1932 through 1936 (R. 151, 161). When they had finished their examination, they left with the Company a copy of their notes which were a voluminous set of papers (R. 150).

At no time thereafter did the Commissioner request petitioner to furnish any further data relating to its claim, nor did he ever complain of the form in which the facts had been furnished to him (R. 153). On the contrary, hearings were held upon the merits of the claim by the Commissioner in his office in Washington on various dates in September and October, 1938, and in April and May, 1939, which were attended by officers and counsel representing the claimant and also by the Commissioner and many of his representatives, including Mr. Freeman Morgan and other economists and attorneys (R. 154, 155).

The hearings concerned not only the floor stocks tax claim but also the petitioner's claim for refund of processing taxes and the Government's counterclaims for deficiencies for income taxes. The Government's method of computing the amounts of refunds to which the petitioner was

entitled and its method of computing amounts claimed to be due from the petitioner for income taxes was reviewed.

At the last of the conferences, Mr. Gallahan, representing the Commissioner, gave Mr. Gearen a memorandum showing the result of the Government's determination of the net amount of the deficiency due to the Government, in which there was set forth as a credit for floor stocks taxes \$160,000 principal and \$51,200 interest accrued thereon as of 1939. The petitioner did not accept the Government's figure nor settle on that basis (R. 220, 156-158).

The Commissioner never allowed or rejected the claim but retained it without decision for 29 months, whereupon suit was brought in the United States District Court on December 4, 1939 (R. 162).

Respondent, in response to petitioner's request, made pursuant to Rule 36 of the Rules of Civil Procedure, admitted in writing the truth of the following matters of fact averred in the complaint, to-wit:

"Thereupon Commissioner sent his accountants and agents to the principal office of plaintiff at Chicago, Illinois, and to various other plants, branch houses and offices of plaintiff throughout the United States and there made extended examinations of the books, records and accounts of plaintiff as to all the records and facts bearing upon the payment by plaintiff of said 'floor stocks taxes', and upon plaintiff's claim for refund thereof.

"After said examinations were made, a number of hearings were held in the office of the Commissioner of Internal Revenue at Washington, D. C., upon the merits of said claims.

"These were attended by the Commissioner and by various of his assistants. Officers and attorneys of plaintiff also attended the said hearings and presented evidence and arguments on said claim." (R. 147, 148.)

At the trial the following material, uncontroverted facts were established:

It was impossible to determine the cost of the inventory or the prices at which it was in fact liquidated (R. 152, 165-168; 171-172, 174, 267, 302-303, 375-376).

In addition to the investigation made before suit by Freeman Morgan and others for the Commissioner of Internal Revenue, there was an investigation made shortly after the complaint was filed by Murray T. Morgan, a brother of Freeman Morgan, at the request of the Department of Justice. Murray T. Morgan had a wide experience in the packing industry and was chief of the Meat Purchase Division of the Livestock and Meat Branch of the War Food Administration at the time he testified (R. 359). With the assistance of seven or eight auditors and clerks, he worked continuously from January of 1940 into May of 1940 (R. 372) investigating the books and records of the petitioner at its general offices and plants (R. 57-58, 162-163) to make an approximation of the value of the inventory in question immediately prior to the date of the imposition of the tax and an approximation of the sales realization from that inventory.

He determined the value of the inventory as of November 4, 1933, by converting it as of that date into the form into which his experience and an examination of the Company's records led him to believe the petitioner had ultimately sold it out according to past practices, and by applying the average prices received by the Company for the week ending November 4, 1933, as shown by the Company's sales reports which were kept on a weekly basis. (R. 375, 378, 379, 384.)

Mr. Morgan then determined the liquidation time which he judged to be required for manufacture, transportation and sale through the Company's several channels of distribution of the various inventory items (R. 378-379). The inventory contained fresh cuts which would be promptly sold as fresh meats. The great bulk of the inventory, how-

ever, consisted of hams and bellies which were or were to become ultimate products, *i.e.*, smoked or cooked hams and bacon. As to a small portion of the poundage, such processing had been completed, but the major poundage was in the early stages of processing and it would require as much as three months to complete the processing before the items were available for sale (R. 113). Plaintiff's Exhibit 22 shows the respective liquidation periods so determined by Mr. Morgan (R. 459). Mr. Morgan determined the weekly prices obtained by the petitioner for similar products during the respective liquidation periods. (R. 453.) Mr. Morgan assumed that a uniform quantity of each item was sold each week during the liquidation period required for that item at the average weekly prices obtained by petitioner for that item through the respective channels of distribution.

By this method Mr. Morgan concluded that the inventory was sold for \$50,913.85 more than its value on November 4, 1933, without taking the tax into consideration (R. 427). Adding the tax of \$283,586.43 to the inventory value the day before the effective date of the tax, the petitioner, on the basis of Mr. Morgan's determination, sold the inventory at a loss of \$232,672.59 (R. 76).

The market prices of the inventory items in the form in which they were ultimately sold increased on Monday, November 6, 1933, the effective date of the tax, by the amount of the floor stocks tax. This was established by the following statement contained in the issue of the daily market service of the National Provisioner dated November 6, 1933, reading:

"The market opened full steady on green hams by a full cent higher than the previous closing figures due to the addition of the Federal tax."

and by the testimony of Mr. Morgan that that was his observation, too, with respect to the most important pork items (R. 368-370).

Since a rise of one cent was equivalent to the amount of the tax, the court found as a fact that the market prices were, on the date of the imposition of the floor stocks tax, increased by the amount of the tax (R. 473).

The Government offered no evidence to show that such increase in market prices was maintained beyond the imposition date of the tax, nor did the trial court make any finding that it was. The fact is that not only was the increase in prices not maintained throughout the period during which the major portion of the inventory was liquidated but that the increase was almost immediately lost because the public refused to absorb the tax. This is shown, in part, by a later issue of the daily market service of the National Provisioner for December 8, 1933, which the petitioner put in evidence and which in summarizing the market reactions and performance for November, 1933, said:

"Considerable increases in hog slaughter during November over that of October, continued weak buying power and a generally uncertain condition due to the processing tax and its increase on December 1 resulted in general weakness in the market for both fresh and cured pork meats. The total of all meats on hand at the end of the month recorded an increase over those of a month earlier while lard showed a slight decrease. *Buyers have shown much resistance to higher prices or to any attempt on the part of packers to pass on the processing tax on hogs. There was an effort early in the month to do this but with little success.*" (Italics ours. R. 533, 297)*

Similar market action is also shown by Mr. Morgan's figures as to prices realized by Cudahy from week to week (R. 453). If the entire inventory had been sold during the week beginning November 13, 1933, at the actual prices for which Mr. Morgan found Cudahy was then selling its

* The rate then in effect for processing tax was the same as for the floor stocks tax and was fifty cents per cwt. live weight for hogs (R. 4, 21).

products, the inventory would have sold for only \$42,209.42 more than it would have sold for on November 4, 1933, before the imposition of the tax. In other words, it would have failed to recoup the tax by \$241,377.01. At Record 453 the prices realized by petitioner throughout the liquidation periods as found by Mr. Morgan are set forth. At Record 76 is stated the total value of the inventory on November 4, as determined by Mr. Morgan. Appendix A hereto is a calculation predicated on those two exhibits showing how the \$42,209.42 is arrived at.

The trial court made no fact finding of the precipitous decline in market prices following November 6, 1933, because it was persuaded that it was without legal significance. The above facts are, however, unimpeached and uncontroverted.

Beginning about the 1st of October in each year, the new crop of hogs begins to reach the market and ordinarily during the last quarter of the year there is a gradual decline in the prices of hog products as a whole. Such a decline as to hog products occurred in the year 1933. (R. 194, 393). But the price of smoked hams which constituted the great bulk of the inventory in question advance in that season almost as often as they decline. (R. 192). The gradual decline in hog products as a whole was interrupted by the sharp rise in market prices which occurred on November 6, 1933, most of which, as above noted, was promptly lost when the prices precipitously fell. This precipitous rise and decline was without precedent (R. 195—Price record of hog products compiled by Department of Agriculture). Following the precipitous decline, a gradual decline set in (R. 214). This precipitous rise and decline which interrupted the gradual seasonal decline is reflected in Mr. Morgan's calculations as to Cudahy particular inventory with the result that the prices received for the inventory items sold during the short-lived, abnormal

bulge and the prices received for inventory items sold during the remainder of the liquidation period, when the great bulk of the inventory was finished and sold, produced \$50,913.85 more than the inventory would have produced at the prices prevailing on November 4, 1933.

Mr. Morgan, on behalf of the Government, determined that if the same inventory had been liquidated over the same period in each of the years 1931 and 1932, the Company would have sustained substantial losses; whereas, as actually liquidated in the year 1933, there was an enhancement in value (R. 366). The implication was that the more favorable performance in 1933 was due entirely to the incidence of the tax.

Both Dr. Lutz and Dr. Coulter, on behalf of the petitioner, testified that the years 1931 and 1932, as well as the greater part of 1933, were abnormal as to business conditions of all kinds and marked the bottom of the depression, but that recovery began sometime in 1933, when some of the indices began to move back. They said the recovery was due to a number of governmental activities, which they described in some detail, and which they concluded provided stimuli resulting in general recovery in the wholesale price index, which was not limited to commodities taxed (R. 338-342) and which resulted also in an increase in the national income and in the prices of all meats (R. 346-348). Dr. Coulter said that the years 1931 and 1932 were in no way comparable, and if any comparison were to be made, a ten-year base from 1920 to 1930 should be employed, but that, as a result of all of the governmental measures mentioned, supply and demand in the pork industry and the prospective purchasing power and monetary values were so changed that the entire situation late in the year 1933 was different from that which obtained in 1932, or even during any normal year (R. 418).

They concluded that if the seasonal decline in the last

quarter of the year 1933 was less than during that period in the years 1931 and 1932, it was due to the recovery measures and to the general upswing in the prices of all commodities which occurred in 1933. Their testimony stands uncontradicted.

Further uncontradicted evidence on behalf of the petitioner showed that its average spread based on hogs acquired in August, September and October and on all hog products sold out in November, December and January averaged 3.24 for the ten years 1921 to 1930, and for the years 1931 and 1932, 2.69 and 2.27, respectively, and for the year 1933, 3.12. During the same ten-year period the statistics of the Department of Agriculture (R. 192) relating to smoked hams, the chief item in petitioner's inventory, shows that the average price of smoked hams during the last quarter of each year increased in four out of 10 years, but that there is a gradual, steady decline in prices shown by the statistics relating to all hog products, both fresh and cured even in those four years (R. 195).

The respondent did not request, nor did the trial court make, any finding of fact that the difference in liquidating performance during the year 1933, as compared with the years 1931 and 1932, was due to the incidence of the tax.

Further facts which we regard as irrelevant and immaterial, but to which we refer because they are mentioned in the opinion of the Circuit Court of Appeals are:

The Government put in evidence two bulletins issued by the petitioner to its branch managers containing instructions relating to "future delivery orders" as to which they were told that the contracts were to be stamped in a prescribed way to indicate that the buyers agreed to pay all taxes imposed upon the goods by any Federal Farm Relief or similar law then or thereafter enacted. It appeared from one of the bulletins that they were afterwards told "to discontinue the use of the statement as

the necessity for its use has disappeared with knowledge of what the processing and floor stocks taxes are. On any sale of pork products from now on with full knowledge of what taxes we will have to pay, the price charged should be sufficient to insure us a reasonable profit over and above the taxes." The bulletins on their faces have to do solely with contracts for future delivery, in relation to which no tax refund is claimed. Products so sold were not sold at the market. The price was prescribed in the contract and the tax was added to the price. Credit was allowed by the petitioner for floor stocks taxes collected in such transactions (R. 48, 171, 172, 217), and its evidence to this effect is uncontradicted.

After the tax was proclaimed by Mr. Wallace and on October 23, 1933, an issue of the National Provisioner contained the following editorial comment:

"The market appears to be in a stronger position on the entire line of product today and buyers apparently showing less resistance to higher price levels. Market prices are advancing all along the line, in anticipation of floor taxes. The processors naturally desire to avoid losses due to this taxation and to establish market values to overcome floor taxes, and the early demand today would indicate fairly good progress in this direction. Offerings are very moderate on green joints today and firmly held at previous week's closing figures; inquiries fairly good."

Basis of Jurisdiction.

On December 10, 1945, the United States Circuit Court of Appeals for the Seventh Circuit filed its opinion affirming the judgment of the United States District Court (R. 493). Appellant (petitioner herein) filed its petition for rehearing (R. 503), which was denied January 15, 1946 (R. 527), the court rendering a separate opinion (R. 525).

Thereafter, on the 22nd day of January, 1946, the mandate of the United States Circuit Court of Appeals was issued to the lower court (R. 527).

As this petition for a writ of certiorari is presented within three months of January 15, 1946, having been filed April 15, 1946, it is presented in due time.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 USCA, Sec. 347 (a).

QUESTIONS PRESENTED.

1. Was there a waiver by the Commissioner of Internal Revenue of the requirement that all evidence relied upon in support of the claim for refund shall be clearly set forth under oath?

2. Are the findings of fact, all of which are conceded to be correct, together with the undisputed evidence on which no findings of fact have been made, sufficient to support conclusion of law No. 2, "that the evidence is insufficient to establish to the satisfaction of the court that plaintiff has borne the burden of the amount of the floor stocks taxes paid by it and that it has not been relieved thereof nor reimbursed therefor nor shifted such burden directly or indirectly?" (R. 473)

3. If conclusion of law No. 2 is not intended to affirmatively state that the petitioner has shifted the burden of the amount of the floor stocks taxes, but means that after full proof of all available facts has been made the trial court is unable to say whether the burden of the floor stocks taxes has or has not been shifted, but that nevertheless recovery should be denied, is not Section 902 so construed in violation of the Fifth Amendment of the Constitution of the United States?

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The important question as to the power of the Commissioner to waive defects in the manner in which proof in support of a claim shall be furnished to him and if he has such power, what action constitutes such a waiver, has not been made clear by this Court in the recent case of *Angelus Milling Co. v. Commissioner*, 65 Sup. Ct. 1162, nor in its prior decisions.
2. The decision of the United States Circuit Court of Appeals is probably in conflict with the decision of this Court in the case above cited.
3. The decision in this case disregards the ruling of the Supreme Court in *Webre Steib Co. v. Commissioner*, 65 Sup. 578, and conflicts with the decision of the fourth Circuit in *Arkwright Mills v. Commissioner*, 139 Fed. 2nd 454, in that it assumes that if the prices were increased by the amount of the tax, the burden of the tax must have been shifted even though the uncontradicted evidence shows that the rise was not maintained.
4. If the Court means by conclusion of law No. 2 that when it cannot be determined from all the pertinent facts whether the burden of the tax has or has not been shifted the claimant cannot recover because it has not been established to the satisfaction of the court that claimant bore the burden, then Section 902, as so construed, is unconstitutional and such a construction is contrary to the decision of this Court in *Anniston Manufacturing Company v. Davis*, 57 Sup. Ct. 816.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

VINCENT O'BRIEN,

JOHN MERRILL BAKER,

Attorneys for Petitioner.